IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 623

CARL F. DELANO,
Petitioner,

vs.

STATE OF MICHIGAN,
Respondent.

REPLY TO BRIEF OPPOSING PETITION FOR CERTIORARI

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REPLY TO COUNTER-STATEMENT OF THE CASE

(Figures in parentheses refer to pages of the record as printed for the court below unless context clearly indicates otherwise)

In the counterstatement prepared by the solicitor general of the State of Michigan several matters are stated in paragraphs 1 to 8, pages 4 to 10. This counterstatement is made up almost entirely of assumptions, conclusions and matters which are not contained in the record. He says that Attorney General Rushton had withdrawn from the grand jury investigation, that the warrant for petitioner's arrest was issued on recommendation of the special prosecuting attorney who was appointed in the latter's place and stead and that thereafter the department of the attorney general took no part in the prosecution of the case nor was it consulted therein, that the attorney general had no connection with the matter until subsequent to the first of January, 1947. He says that the "precise truth" is that Justice Dethmers had nothing to do with the case during his entire term of office as attorney general. There

is not a scrap of evidence of any kind in the record to support these assertions.

As to the claim that no federal question was presented to the court below we stand on the record.

In paragraph 4 he says that although the circuit judge who conducted the investigation and issued the warrant, presided as examining magistrate and later heard petitioner's motion to quash and motion for separate trial, that petitioner did not challenge the qualification of the circuit judge or file an affidavit of prejudice.

An affidavit of prejudice is necessary in Michigan only in a very limited sense. The statute, Sec. 27.466, *Michigan Statutes Annotated, Compiled Laws for 1929*, Sec. 13888, provides that written objection on account of disqualification is only necessary where the judge is related within the third degree of consanguinity to either of the attorneys or either party to said cause. (Foot Note 1). This statute has been construed in *Equitable Trust Company vs. Fisher*, 301 Mich. 77, in which the court held, citing *Hall vs. Thayer*, 105 Mass. 219, that,

> " 'The right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit', rests upon a principle so obviously just, and so necessary for the protection of the citizen against injustice, that no argument is necessary to sustain it, but it must be accepted as an elementary truth."

The court also said that citizens have the right

> "to have their rights heard and determined by an impartial tribunal, free from bias, prejudice and interest, * * *."
>
> "It is a principle so elementary in nature that the application thereof is not open to confession."

In *Horton vs. Howard*, 79 Mich. 642, the court below held,

(See Foot Note 1 in Appendix).

> "No judge can sit in his own cause. Should he do so, a decree rendered by him in his own favor would be utterly void. *If he can not sit, his seat in a judicial sense is vacant and his acts are without judicial sanction.*"

The acts of a judge who is disqualified are utterly void. See *Kennedy vs. State,* 142 S. E. (Ga.) 751.

> "From whatever source the disqualification to preside in a case may arise, the effect when such disqualification exists, is to divest jurisdiction and the action taken is coram non judice, and void."

In this case the justice sitting had been the solicitor general during the pendency of the case in question.
See *State vs. Martin,* 256 Pac. 681.

It is clear from the examination of the Michigan Statute Sec. 13888 of the Compiled Laws of Michigan for 1929 that all grounds for disqualification stated therein, except that of third degree of consanguinity to the attorneys, is jurisdictional and can not be waived. The statute specifically provides that the objection to relationship within the third degree of consanguinity may be waived by stipulation and shall be deemed to have been waived unless a written objection on account of such disqualification is filed. No waiver is provided for for any other ground of disqualification. Therefore, the disqualification being jurisdictional it follows that it could not be waived, hence no formal or other objection is necessary and the act of any judge under such disqualification is void and may be collaterally attacted or raised for the first time upon appeal.

In the same paragraph he says "The record does not include the transcript of the preliminary examination; the question was not raised on motion to quash". In this counsel is in error. The transcript of the testimony taken at the examination is found beginning on page 14 of the record under a separate heading. (Foot Note 2). The testimony continues to and including page 248 which is a

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(See Foot Note 2 in Appendix).

sizable portion of a record of 891 pages. This question was not abandoned in defendant's and petitioner's brief. It was raised on page 24 thereof, it being claimed that the arrest, arraignment, trial, conviction and sentence of the respondent was in violation of the Fourteenth Amendment to the Constitution of the United States in that the petitioner had been deprived of liberty and property without due process of law and that he had been denied the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Counsel for petitioner does not believe that it is necessary, in order to raise a federal question, that the question be specifically so designated but that it is enough if the assignment itself raises a federal question as in this case.

Replying to paragraph 6 on page 7 petitioner says that he was charged with a conspiracy to pass a certain bill through the legislature of the State of Michigan by means of bribery and that he was tried on such a charge and convicted. That subsequently the charge was changed by the phraseology of the courts and the special prosecutor and now the solicitor general to a "conspiracy to corrupt the legislature".

Further that the court below affirmed petitioner's conviction of that offense and not of the offense charged and of which he was convicted.

This court said in *Cole vs. State of Arkansas,* 68 Sup. Ct. Rpr. 517,

> "No principle of procedural due process is more clearly established and that notice of the specific charge and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." Citing In Re Oliver, 332 U. S. ; 68 Sup. Ct. 499, a recent case from Michigan.

In the case cited the respondents had been convicted of one offense and sentenced upon another which sentence was affirmed by the Supreme Court of the State of Arkansas.

The court held that "We are constrained to hold that the petitioners have been denied safeguards guaranteed by due process of law — safeguards essential to liberty in a government dedicated to justice under law".

He says, at the bottom of page 8, that he will show that Mr. Justice Dethmers, while attorney general, had absolutely nothing to do with the case and sets forth what he claims are facts. We do not claim that he ever personally intervened and we think it immaterial that his name does not appear on the record. We note that counsel for the state attempts to explain why this case is listed in the biennial report of the attorney general and excuses it by saying that neither he, the attorney general, nor the solicitor general had participated.

All of the matters stated on page 10, while they may be true, are not contained in the record and petitioner's counsel has no knowledge of the truth of such statements except that he admits that oral arguments were heard in June of 1947.

In paragraph 8 on page 10 he attempts to create the impression that although the attorney general possesses the power of supervision over prosecuting attorneys and may intervene in the trial of a criminal case; that in the Supreme Court the solicitor general has charge of state cases but neglects to state the fact that he is a member of the attorney general's staff.

In 27 Michigan State Bar Journal 27 a laudatory article concerning the solicitor general is published. (Foot Note 3). It will be noticed that the solicitor general, under the direction of the attorney general, has charge of causes in the Supreme Court of Michigan.

Under the constitution of the State of Michigan as set forth on page 19 of the Petition for Writ of Certiorari the attorney general has power to prosecute and defend all actions in the Supreme Court in which the state shall be interested or a party, he may intervene and appear for the people of the state "in any cause or matter, civil or

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(See Foot Note 3 in Appendix).

criminal, in which the people of this state may be a party in interest". The statute provides that he shall have general supervision over all prosecuting attorneys. This statute goes back to 1846 and in 1939 by Act No. 248 of Michigan Public Acts of 1939, Section 35 (Foot Note 4) the attorney general was authorized to appoint such assistant attorneys general as he might deem necessary and that he might designate one of his assistants to act in his behalf on certain boards and commissions and to appear for the State of Michigan in any suit or action before any court or administrative body or before *any grand jury* with the same powers and duties and in like cases as the attorney general but at all times be subject to the *orders and directions of the attorney general and to hold office during his pleasure.*

At the same session of the legislature the office of solicitor general was created by Act No. 144 of the Public Acts of 1939, Section 28. (Foot Note 5). By this section the attorney general was authorized to designate one of his assistant attorney generals to be known as solicitor general who, under his direction, should have charge of cases in the Supreme Court (criminal) and providing that the attorney general *shall,* upon the request of the Governor or either branch of the legislature, and *may,* when in his judgment the interests of the state require it, intervene in any matter, civil or criminal, in which the state may be a party or interested.

From the above and the matters contained in the foot notes it is crystal clear that the solicitor general is a member of the attorney general's staff and acts at his pleasure and in his stead. From the whole of the record it is clear that under the powers conferred upon the attorney general by the constitution and the various statutes cited, the attorney general, either by himself or by the solicitor general or by any other assistant attorney general, had the power to intervene in the grand jury proceedings in question and to take over the trial of the case in question. He was at

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(See Foot Note 4 in Appendix).

(See Foot Note 5 in Appendix).

all times chief prosecuting officer of the State of Michigan and whether he exercised the powers inherent in his office is of no consequence. The fact that he held the office of attorney general during the time this case was tried in the Circuit Court for the County of Ingham and for some time thereafter during which it was appealed to the Supreme Court, clearly disqualified him from participating therein after he became a Justice of the Supreme Court of Michigan.

In the case of *Shannon vs. Smith*, 31 Mich. 450, the lower court held that a judge who had been consulted or employed as counsel in the subject matter to be litigated was disqualified to act therein and set aside as void an order made by a judge laboring under such a disqualification, transferring the cause to another circuit because of such disqualification.

In *People vs. Crappa*, 238 Pac. 731 (Cal.) the California Supreme Court held that one who had acted as district attorney in a prosecution was disqualified to act as trial judge.

REPLY TO ARGUMENT

In paragraph 1, page 12, the solicitor general again complains of the omission from the record of the transcript of the preliminary examination. He says "petitioner did not see fit, in settling his bill of exceptions, to include a transcript of the preliminary examination or the magistrate's return; there is a gap in the printed record between the warrant (7-10) and the information (11). Had he intended to stress the point now emphasized, he should have done this. There is, therefore, no record of any protest the petitioner may have made during the preliminary examination." Had the solicitor general looked in the index to the record or examined the record for four more pages he would have found the transcript of the testimony which has been hereinbefore referred to, beginning on page 14. Therefore there is a record of the protest made by the petitioner and the record is complete in every particular.

The second allegation on page 12 that the petitioner did not object to the grand juror, examining magistrate and circuit judge, Hon. Leland W. Carr, presiding at the examination or passing upon his motion to quash and motion for separate trial, we have already pointed out that no objection is necessary in the State of Michigan and that the fact that the judge did so act, although disqualified, divested him of jurisdiction. No affidavit of prejudice is necessary in the State of Michigan and the question may be raised for the first time upon appeal. It was not abandoned.

REPLY TO POINT TWO

Replying to point 2 on page 13 they quote from petitioner's brief, pages 18 and 19, and say that counsel for petitioner are misinformed or mistaken as to the facts when they made the quoted statement. Every single word in the quoted statement is true according to the record in this cause and whether the attorney general took any part in the prosecution of petitioner or was consulted is of no consequence. He says that it was not until January, 1947 that the solicitor general assumed charge of the case on appeal. There is no proof of this in the record. As to whether Judge Carr participated in a motion for rehearing we have no knowledge. We relied upon the certified copy of the order denying the rehearing as certified to the Supreme Court of the United States.

We note in the State's brief that a corrected certified copy of this entry has been filed. We do not have any knowledge of any such occurrence.

REPLY TO POINT THREE

Point 3 on page 15 deals with the remarks made by the special prosecutor. This subject has been argued in petitioner's brief and a few of the remarks set forth therein. The solicitor general has seen fit to quote others. The quoted remarks are only a few of the 112 remarks which were the subject of Assignments of Error.

Counsel for petitioner has made an exhaustive search of the authorities on this subject and do not find anywhere where any prosecuting attorney has been guilty of such conduct as the special prosecutor was guilty of in this case.

In the State of Michigan, and in most other jurisdictions, it is reversible error for the prosecuting attorney to comment upon the failure of a defendant in a criminal case to take the stand in his own behalf. No such comment was made in this case but it is just as improper to refer to it now in these proceedings. See page 7, note 8, of State's brief. It is true that the petitioner did not take the stand. His reasons for not taking the stand are well known to counsel for petitioner. These reasons have ceased to exist and if he is granted a new trial he will take the stand if he is physically and mentally able to do so.

The contents of note 8 above referred to is indicative of the whole attitude of the special prosecutor, of the solicitor general and of the Supreme Court of the State of Michigan, that petitioner did not take the witness stand, therefore, he was guilty and being guilty it does not matter whether his constitutional rights are observed or not. We need not point out the fallacy of such a position.

REPLY TO POINT FOUR

Answering point 4, page 25, petitioner's counsel state that they have covered this subject in their brief and petition for certiorari.

Answering the State's brief generally petitioner calls attention to the last paragraph on page 24 in which the solicitor general says that it is unfair "for defense counsel to await conviction in a criminal case and then, for the first time, comb the cold record for any remarks of the prosecuting officer which might be urged as error or as denial of due process; *it is not fair to* the trial judge."

The trial judge had plenty of opportunity to correct the situation which arose in this case because of the vicious remarks of the special prosecutor. Nearly all of them were objected to but not once was the special prosecutor admonished by the court nor was he ever held within reasonable bounds in his remarks. Further than that the trial court had an opportunity to correct this situation as the same was raised in a motion for a new trial filed by petitioner (R. 878, Vol. 2) paragraph four of said motion dealing wholly and particularly with the prejudicial remarks of the special prosecutor. This motion was denied.

The court's attention is called to the fact that in the official report of this case, 318 Mich. 557, the attorney for the People are listed as follows: Eugene F. Black, Attorney General, Edmund E. Shepherd, Solicitor General, H. H. Warner and Victor S. Anderson, Assistant Attorneys General and Richard B. Foster, Special Assistant Prosecuting Attorney, for the People. It would seem as though the attorney general's office was fairly well represented in this cause.

Counsel refers in note 7, page 6, to Michigan Court Rule 67, Sec. 1, which required that the appellant shall concisely, and without repetition, state the questions involved. The rule formerly required all of these questions to be stated on one page. It is now permissible to use more than one page but they must be very brief.

On page 12 he seems to confuse the "Assignments of Error" with the "Statement of Questions Involved". It

is not necessary that each Assignment of Error be set out specifically in the Statement of Questions Involved. In this cause the Assignments of Error cover 73 pages (R. 802 to 875 inc.)

Counsel for the State, on page 17 of his brief, says that the "statements of the prosecuting officer, in the majority of instances, were made without objection by defense counsel, and no judicial ruling was requested or obtained; * * *." This is not true. A great many of the statements were objected to by counsel. It is true that on several of them rulings were not obtained but that is no fault of counsel.

He says further "indeed, in most of them, argument between opposing counsel was carried forward by the defense on the same plane of repartee". This is untrue. The record does not show that at any time the defendant attorneys carried on "repartee" with the special prosecutor. The defense counsel conducted themselves in a gentlemanly manner throughout the trial. The remarks of the special prosecutor were entirely unprovoked, unnecessary and uncalled for. Never, at any time during the trial, was there any humorous exchanges between counsel for the defense and the special prosecutor. From the very beginning counsel for the defense felt that they were being imposed upon by the special prosecutor and that their clients were being prejudiced by such conduct. There was no good feeling, only bitterness, between the counsel for the defense and the special prosecutor.

CONCLUSION

We, therefore, respectfully submit that certiorari should issue in this cause to the Supreme Court of Michigan and that the said cause be reversed and the petitioner discharged or that he be granted a new trial.

Respectfully submitted,

FRANK L. BLACKMAN,
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BLACKMAN AND BLACKMAN,
Of Counsel.

APPENDIX

Foot Note 1--

Compiled Laws of Michigan for 1929, Sec. 13888. No judge of any court shall sit as such in any cause or proceeding in which he is a party, or in which he is interested, or in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties; nor shall any judge decide, or take part in the decision of any question which shall have been argued in the court, when he was not present and sitting therein as a judge. Nor shall any judge sit as a court in any cause in which he is related within the third (3rd) degree of consanguinity to either of the attorneys or counselors of either party to said cause: Provided, That such last mentioned disqualification be made to appear and that it may be waived by stipulation filed in the cause; and it shall be deemed to have been waived unless the objection on account if such qualification (disqualification) shall have been filed in writing at or before the commencement of the trial or hearing.

Foot Note 2—

Testimony taken and proceedings had at hearing on examination in the above entitled cause, before the Hon. Leland W. Carr, sitting as the examining magistrate, beginning at 10:35 A. M. Tuesday, January 9, 1945.

Foot Note 3—

THE SOLICITOR GENERAL by DANIEL J. O'HARA, Assistant Attorney General.

Edmund E. Shepherd, whose photograph appears on this month's cover, has been Solicitor General of Michigan since the creation of that office in 1939. The revised statutes of 1846 then provided among other things that the Attorney General should prosecute and defend all actions in the Supreme Court in which the State should be interested or a prty, but the legislature nine years ago amended such provisions to permit the Attorney General, in his discretion, to designate one of his assistants to be known as the Solicitor General, and who, under his direction, would have charge of such cases in the Supreme Court.

Foot Note 4—

Act No. 248 of Michigan Public Acts of 1939. Sec. 35. The attorney general shall receive an annual salary of $5000.00, payable as provided by law, and his actual necessary expenses. In addition to a deputy provided by law, the attorney general may appoint such assistant attorneys general as he may deem necessary, and who when appointed to such office shall take and subscribe the constitutional oath of office. Any such assistant attorney general may, when designated thereto by his principal, serve in the place of the attorney general as a member of the public debt commission created by act number 13, public acts of 1932, extra session, and on any other board or commission of which the attorney general is now or may hereafter be an ex officio member, appear for the state in any suit or action before any court or administrative body, or before any grand jury, with the same powers and duties and in like cases as the attorney general, but shall at all times be subject to the orders and directions of the attorney general. Such assistants shall hold office at the pleasure of the attorney general. Effective June 15, 1939.

Foot Note 5—

Act No. 144 of Michigan Public Acts of 1939. Sec. 28. The attorney general shall prosecute and defend all actions in the supreme court, in which the state shall be interested, or a party; he may, in his discretion, designate one of the assistant attorneys general to be known as the solicitor general, who, under his direction, shall have charge of such cases in the supreme court and shall perform such other duties as may be assigned to him; and the attorney general shall also, when requested by the governor, or either branch of the legislature, and may, when in his own judgment the interests of the state require it, intervene in and appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of this state may be a party or interested. Effective May 26, 1939.